Keystone Steel & Wire Division of Keystone Consolidated Industries Inc. *and* Independent Steel Workers' Alliance. Case 33–CA–8519

October 22, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On February 18, 1992, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief, cross-exceptions and a supporting brief, and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent had no obligation to bargain with the Union before making unilateral changes in its management pension plan and recommended dismissal of the 8(a)(5) complaint alleging these changes to be unlawful. We disagree.

I.

The facts are not in dispute. The Respondent has long provided pension benefits under two plans: the Keystone-Bartonville Pension Plan, provided under the parties' collective-bargaining agreement (Union Plan) and the Keystone Steel & Wire Company Pension Plan (Management Plan). The Union Plan covers bargaining unit employees, and the Management Plan applies to supervisory, managerial, and other nonbargaining unit employees. Since before 1958, some bargaining unit employees have earned benefits under the Union Plan before being transferred or promoted into nonunit positions. When these employees returned to the unit from nonbargaining unit positions, they resumed active participation in the Union Plan and remained inactive participants in the Management Plan, in which they had earned benefits. These individuals are referred to as ''dual participants.''

The Union and Management Plans are funded by separate trusts, whose assets are separately accounted for. Each plan forbids payment of benefits to any retiree based on periods of employment for which he is entitled to benefits under another plan. Both plans provided, prior to 1982, a ''thirty-and-out'' option under which participants would be eligible for retirement—with an immediate full benefit—upon completing 30 years of vesting service with the Respondent. In counting years of service, both plans allowed participants to combine all bargaining unit and nonbargaining unit employment. For anyone transferred between unit and nonunit service within a plan year, the individual's placement at year's end determined the Respondent's funding and reporting obligations for that individual for that year.[1] The formulas for accrual of benefits have been identical under both plans for dual participants employed between 1981 and 1989.

During the early to mid-1980s, the Respondent obtained ''funding waivers'' for both plans pursuant to section 412(d) of the Internal Revenue Code and section 303 of the Employee Retirement Income Security Act (ERISA). The waivers permitted the Respondent to amortize its annual contributions for the plan years ending June 30, 1980, 1984, and 1985, over a period of 15 years each. The last waiver expires June 30, 2000.

Additionally, in 1981, separate formulas were established under each plan for benefits earned and service accrued through 1980. These ''frozen'' benefit amounts were computed for all employees before and during 1981, including all dual participants, and the dollar amounts were recorded in their personnel files. Separate formulas were then established for each plan to determine annual post-1980 benefits. Thus, the dollar amount of benefits earned and payable to individuals employed both before and after 1981 consisted of the sum of the 1980 ''frozen'' amount, if any, and the post-1980 benefit computed under one or both of the new formulas, depending on whether the individual was a post-1980 dual participant.[2] Until 1986, each retiree was paid a single monthly check drawn from the trust corresponding to the plan in which he last actively participated.

Effective May 3, 1982, the Union Plan was amended to limit the ''thirty-and-out'' option to participants who had been hired or rehired before that date and employed continuously thereafter with no break in service. The Respondent also amended the Management Plan effective November 1, 1982, to eliminate the ''thirty-and-out'' option entirely except for participants who had already completed 30 years of vesting service by that date. At the same time, a new option was instituted entitling Management Plan participants to a full immediate benefit upon retirement when the sum of the participant's age and his years of vesting service equals or exceeds 90.

[1] The Union and Management Plans operate under the same plan year.

[2] Thus, after December 31, 1980, a dual participant's total monthly benefit upon retirement consisted of the sum of (1) the pre-1981 ''frozen'' amount; (2) any benefit accrued after December 31, 1980, under the Management Plan's post-1980 formula; and (3) any benefit accrued after December 31, 1980, under the Union Plan's post-1980 formula.

In 1985, the Union became aware that the Respondent had regularly charged the trust that funded the Union Plan for benefits paid to all dual participants who retired as unit employees, without regard to their service under the Management Plan. The Union objected that: (1) assets from the trust that funded the Union Plan should not be used to pay the entire retirement benefit of a dual participant returning to the Union Plan, but that the benefits should be allocated between both trusts; and (2) the Union Plan should be made whole for past misallocation of charges to its trust.

The parties agreed, in 1986, that the Respondent would: (1) identify dual participants who had retired since September 30, 1982; (2) determine the correct allocation of benefits attributable to each plan; (3) determine whether and to what extent the Union Plan trust had been overcharged; (4) restore the amount overcharged to the Union plan trust, with interest; and (5) charge the assets of the Union Plan thereafter in proportion to benefits earned under that plan. In addition, the parties agreed to a formula to determine how benefits were to be charged to each plan. Finally, it was agreed that no adjustment would be made to the allocation of benefit payments for dual participants who retired before September 30, 1982. In accordance with the agreement, the trustee for the Management Plan made the Union Plan whole for the overcharges, and benefits have since been allocated and charged to assets of the appropriate plan.

Between September 30 and October 31, 1982, three dual participants retired. These were the only retirees affected by the 1986 correction who had retired before the Respondent eliminated the ''thirty-and-out'' option from the Management Plan. They therefore had qualified for the ''thirty-and-out'' option under both plans. Twenty dual participants had retired between November 1, 1982, and July 31, 1986, the time of the correction. In accordance with the 1986 agreement, the Union Plan was made whole for the amount it had been overcharged for all these 23 retired dual participants.

After the correction, but before November 1, 1988, when further changes as set forth below were made to the Management Plan, 15 more dual participants retired, for a total of 35 dual participants retiring between November 1, 1982, and November 1, 1988. Of these 35 dual participants, 19 (the Affected Retirees) qualified for a full benefit under the ''thirty-and-out'' option of the Union Plan, but did not qualify for a full benefit under any option of the Management Plan.[3] The Respondent, however, permitted payment to each of these 19 retirees of a full monthly accrued benefit under both plans, with payments allocated as the 1986 agreement provided.

In November 1988, the Respondent, advised by its attorneys that the payment of benefits under the Management Plan to the Affected Retirees was inconsistent with the provisions of that plan, decided on the following course of action. It would: (1) discontinue the practice of making benefit payments from the Management Plan to dual participants who thereafter retired under the Union Plan's ''thirty-and-out'' option but did not qualify for any retirement option under the Management Plan; (2) begin making payments to the 19 Affected Retirees out of the Respondent's general assets rather than out of the Management Plan's trust until these retirees became eligible for benefits under one of that plan's options; (3) repay the Management Plan's trust until these retirees became eligible for benefits under one of that plan's options; repay the trust that funded the Management Plan the amounts that had been paid out to the Affected Retirees, plus the earnings that those funds would have accrued; and (4) notify all dual participants of these measures.

At the time the Respondent decided to take these measures, but before it notified Management Plan participants of the changes, there were three dual participants employed in nonbargaining unit positions who had already formally applied for retirement under both plans on the assumption that they were entitled to return to the unit and retire with a full benefit from each plan. The Respondent decided to treat these three as Affected Retirees. At that time, there were an additional 147 dual participants employed in nonbargaining unit positions and at least 36 dual participants in bargaining unit positions.

At the direction of the Respondent's vice president of administrative services, Lyle Pfeffinger, letters explaining the above changes were mailed to the Affected Retirees and dual participants in nonbargaining unit positions on November 10, 1988, and to dual participants in bargaining unit positions on November 21. On November 23 the Union wrote to the Respondent protesting the changes in the Management Plan and arguing that the changes could not be made during the term of the current collective-bargaining agreement. The Respondent replied on December 15 denying that it had any obligation to bargain with the Union over the terms of the Management Plan or how it was administered. It also denied that there had been any changes in the language of the Management Plan.

II.

The judge found that the Respondent had no obligation to bargain with the Union over the Management Plan, unlike the Union Plan over which the parties have previously bargained. The judge noted that the Union has had no input into the Management Plan and

[3] The other 16 retirees qualified for various retirement options under both plans.

that the benefits it provides were ''meant to be enjoyed'' only by nonbargaining unit employees. The judge further observed that the Management Plan defines the retirement terms of individuals who are ''neither covered by the collective-bargaining agreement nor represented by the Union at the time these employees are earning such benefits (footnote omitted).'' The judge recommended dismissal of the complaint.

The General Counsel excepts, arguing that a decision to change the administration of employee pension benefits is a mandatory subject of bargaining, and that the Respondent has, by unilaterally altering the practice under which it has administered the Management Plan, effectively changed the pension benefits of dual participant employees in the bargaining unit. The General Counsel contends that the two plans are interrelated regarding vesting, eligibility, and funding, and that the changes the Respondent made in the Management Plan in November 1988 defeated expectations the Respondent had raised among bargaining unit employees who had worked outside the unit in the past.

In cross-exceptions, the Respondent contends that, even if it unilaterally altered a mandatory subject of bargaining, its actions were required by law. Specifically, it argues that when it determined in November 1988 that it had been administering the Management Plan's ''thirty-and-out'' plan illegally, the trustee of its plan had no discretion as to whether to continue that course, but rather was compelled under the Employee Retirement Income Security Act of 1974 (ERISA) to discontinue paying benefits to future retirees who had been dual participants. It also excepts that the judge did not address its argument that the Union had failed to request, and therefore had waived, any right to demand bargaining.

The Respondent agrees with the judge that the Management Plan is not subject to mandatory bargaining. Comparing the bargaining unit dual participants to retirees or job applicants subject to prehire drug and alcohol testing, the Respondent contends that bargaining over the Management Plan would adversely affect the community of interest of unit employees and make the unit inappropriate, citing *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971); and *Star Tribune*, 295 NLRB 543 (1989). The Respondent also contends that any legal entitlement inuring to bargaining unit employees under the previous administration of the plan arose independently of the collective-bargaining relationship and should therefore not be the predicate for a statutory bargaining obligation. It also maintains that the terms and conditions of bargaining unit employees were affected only indirectly by the November 1988 changes. Finally, because the Management Plan covers, among others, supervisors whose terms and conditions are not covered by the Act, the Respondent contends that any bargaining obligation would run afoul of Sections 2(3) and 14(a) of the Act.

III.

We find merit in the General Counsel's exceptions. It is well established that pension benefits accruing to employees are terms and conditions of employment and therefore subject to mandatory bargaining. *Inland Steel Co.*, 77 NLRB 1 (1948). Before 1982 the Management Plan and the Union Plan each contained a ''thirty-and-out'' retirement option. Any employee who had service under both plans and had worked for the Respondent for 30 years satisfied the eligibility requirements of both plans, as those requirements were identical and all employment with the Respondent both in and outside of the bargaining unit counted toward the 30 years of employment requirement.

In 1982, the Respondent announced elimination of the Management Plan's thirty-and-out option (except for employees who already had 30 years of service) but retained the Union Plan's thirty-and-out option for current employees. The Respondent then adopted a practice of permitting unit employees who were dual participants and eligible for retirement under the Union Plan's thirty-and-out option to retire and receive pension benefit payments under that plan and also under the Management Plan, even if they were not eligible for pension payments under any of the retirement options described in the Managment Plan's formal documents. Because employees retiring from the unit received better pension and medical benefits, dual participants working outside the unit made an effort to return to positions within the unit before retiring. Thus, virtually all dual participants who retired after 1982 occupied bargaining unit positions preceding their retirement.

The Respondent's practice of paying pension benefits under both the Union Plan and the Management Plan to dual participants who retired from unit positions and met the Union Plan's thirty-and-out eligibility requirement became well established. It continued for 6 years and was applied to 19 dual participants retiring during that period who otherwise would not have received pension benefit payments under the Management Plan. By this practice, the Respondent provided an enhanced pension benefit available only to unit employees: if they were dual participants and eligible to retire under the Union Plan's thirty-and-out option, they also would receive pension payments under the Management Plan without regard to whether they otherwise met the eligibility requirements of the Management Plan. This practice—directly linked to employment in the bargaining unit—became an implied term and condition of employment of bargaining

unit employees by mutual consent of the parties,[4] and, therefore, a mandatory subject of bargaining that the Respondent could not unilaterally change.

Once an implied term of employment is established, any unilateral change in that term by an employer, whatever its intentions, violates Section 8(a)(5) of the Act.[5] Therefore, contrary to the judge and the Respondent, it is immaterial that the parties may not have bargained over the Management Plan benefits in the past or that the benefits extended under the plan's ''thirty-and-out'' option may not have been intended to be enjoyed by unit employees.

It is also immaterial whether the periods of time during which the benefits were accrued by employees corresponds to their employment outside the unit. The Union Plan, and for that matter the Management Plan, permitted participants to combine all periods of prior service to obtain benefits, both unit and nonunit service. The change thus affected a benefit previously available to present unit employees. As a result of this change, some employees who previously had accrued rights towards a full benefit after 30 years of combined service must delay retirement until they reach the minimum age for eligibility under a Management Plan retirement option in order to obtain the same benefit.[6]

The Respondent further contends that the Union's failure to request bargaining after it was presented with the changes the Respondent contemplated in the Management Plan amounted to a waiver, excusing the Respondent from further bargaining. In support of its contention, the Respondent relies in part on the testimony of Company President Robert Singer that Company CEO Glenn Simmons told the union officers on November 3, 1988, that ''in general terms,'' as the Respondent summarizes, ''*a decision had been made* that persons who had previously been employed in the bargaining unit before assuming nonunit employment and subsequently returned to the unit'' would no longer receive ''thirty-and-out'' benefits unless they qualified under the terms of the Management Plan.

We find that the Respondent presented the November 1988 changes to the Union as a fait accompli and that any request for bargaining in these circumstances would have been futile. First, the Respondent consistently took the position throughout its discussions with the Union that any change in administration of the Management Plan was not subject to mandatory bargaining. Second, the Respondent's own proffered testimony does not support a finding that it had been amenable to bargaining when it first raised the plan changes with union officials. According to CEO Singer, the purpose of the November 3 meeting ''was merely to inform the officers that *the decision had been made* to make the changes.'' Thus, whatever knowledge about the impact of the changes on bargaining unit employees that may have been imparted to the Union between November 3 and 18, when the Respondent presented the union officials with the letters addressed to unit employees, any request for bargaining over its admitted ''decision'' would have been futile. In any event, the Union *did* request bargaining in its November 23 letter to the Respondent. In response, the Respondent did not assert a waiver in bargaining, but merely reiterated its position that it had no obligation to bargain about the changes.

Finally, we reject the Respondent's defense that it was ''legally compelled'' to proceed unilaterally. The Respondent relies specifically on: (1) Section 404(a)(1)(D) of ERISA which charges pension plan administrators with the fiduciary responsibility to administer plans in accordance with their own terms; and (2) Internal Revenue Code, Section 412(f)(2), and ERISA, section 304(b)(2), forbidding employers who have obtained funding waivers, as has the Respondent, from increasing pension benefits. Simply put, neither of these statutes proscribes the action that the Respondent is obligated to undertake under Section 8(a)(5) of our statute—namely, to *bargain* over changes in administration of its pension plan.[7] As stated by the Board in *Foodway*, 234 NLRB 72, 77 (1978):

[4] See *Riverside Cement Co.*, 296 NLRB 840, 841 (1989), and cases cited there at fn. 6.

[5] See *Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991).

[6] This differs from the adverse impact that may be suffered by unit employees in the incidental elimination of benefits from individuals outside the unit. Compare *Beitler-McKee Optical Co.*, 287 NLRB 1311, 1312 (1988) (elimination of family coverage from unit employees' existing health insurance plan held unlawful even though all unit employees were then single and ineligible to use family coverage), with *Torrington Co.*, 305 NLRB 938 (1991), reaffd. 307 NLRB 485 (1992) (elimination of internal coordination of health insurance benefits that had previously enabled nonunit employees to apply for supplemental coverage of their unit-member spouses' medical expenses held lawful where unit spouses' terms and conditions of employment were unaffected). Here, similar to the benefits eliminated in *Beitler-McKee*, and unlike those curtailed in *Torrington*, the Respondent's change in its practice in administering the Management Plan affects the terms and conditions of employment of unit employees.

The Respondent's arguments likening the individuals affected by the Management Plan changes to nonbargaining unit members such as retirees and job applicants and contending that the Management Plan principally covers supervisors and therefore is inconsistent with the terms of Secs. 2(3) and 14(a) are likewise unavailing. The changes to the Management Plan affected the rights of individuals who were employees in the bargaining unit at the time the Respondent acted unilaterally and who were not, at least at that time, supervisors. Thus, the question raised in *Chemical Workers v. Pittsburgh Plate Glass*, supra, with respect to former employees who had already retired and were thus no longer ''employees'' under the statute—whether the unilateral changes ''vitally affect'' the terms and conditions of employment of unit employees—is, contrary to the judge, answered decidedly in the affirmative here.

[7] Moreover, contrary to the Respondent's contentions, it is not clear that continuation of the Respondent's practice of paying pension benefits under the Management Plan to dual participants in the

Continued

> [T]he salient principle applicable to the instant inquiry is that the Union was entitled to an opportunity to negotiate concerning the matter and not to be confronted in fact or in substance with a fait accompli [citation omitted]. The General Counsel correctly contends that the Act is the legislative scheme which, in final analysis, prescribes the Respondent's bargaining obligation. While the mandate and requirements of other Federal statutes may serve to limit the area of discretion which a party may exercise in fulfilling [its] bargaining obligation . . . to enter into the bargaining process in good faith is not thereby minimized or obviated [citations omitted].

By presenting the Management Plan changes to the Union as a fait accompli and thereafter refusing to honor the Union's request to bargain in good faith over the changes in employee pension rights, a mandatory subject of bargaining, the Respondent has violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for purposes of collective bargaining:

> All employees employed by the Respondent in or about its Bartonville, Illinois plants and offices; excluding supervisors, temporary supervisors, permanent foremen, temporary foremen, relief foremen, guards, and firemen, registered nurses, and any other person or persons in the employ of Respondent who are not covered by that collective-bargaining agreement between Respondent and the Union in effect by its terms until May 3, 1990.

4. At all times material, the Union has been the exclusive collective-bargaining representative of the employees in the unit described above.

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in its Management Pension Plan that adversely affect pension benefits previously earned by unit employees.

6. The above-unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully implemented changes in its Management Pension Plan, we shall order the Respondent to bargain with the Union over the changes and to make whole the affected dual participant unit employees. Payments shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970). Interest on all amounts owing will be paid in accordance with the formula set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Keystone Steel & Wire Division of Keystone Consolidated Industries, Inc., Bartonville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing changes in its Management Pension Plan adversely affecting unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Independent Steel Workers' Alliance as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit described below and, if an understanding is reached, embody that understanding in a signed contract. The appropriate unit is:

> All employees employed by the Respondent in or about its Bartonville, Illinois plants and offices; excluding supervisors, temporary supervisors, permanent foremen, temporary foremen, relief foremen, guards, and firemen, registered nurses, and any other person or persons in the employ of Respondent who are not covered by that collective-bargaining agreement between Respondent and the Union in effect by its terms until May 3, 1990.

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unit who retire under the Union Plan's thirty-and-out option would violate the Respondent's fiduciary duty or that such a fiduciary duty, if one exists, legally compelled the Respondent to make the particular changes it made. It appears that the Respondent could have amended its plan to conform to its practice, rather than discontinuing the practice. Alternatively, the Respondent could have proposed paying the benefits in question from its own assets, rather than from the Management Plan trust, as it did with respect to dual participants who had already retired. Further, the Respondent's contention that continuation of the practice in question or modifying its plan to conform to its practice would jeopardize the IRS funding waiver clearly does not constitute legal compulsion. While rescission of the funding waiver might have adverse economic consequences for the Respondent, the Respondent was not legally required to retain the waiver.

(b) Make whole dual participant unit employees affected by the Respondent's changes in the Management Pension Plan in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Bartonville, Illinois facility and mail to dual participant employees who retired since the effective date of the Respondent's changes in the Management Pension Plan copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT make unilateral changes in the Management Pension Plan affecting bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Independent Steel Workers' Alliance as the exclusive representative of the employees in the appropriate bargaining unit, described below, and, if an understanding is reached, embody that understanding in a signed contract, and WE WILL make whole dual participant bargaining unit employees for any losses they suffered as a result of the unilateral changes in the Management Pension Plan, with interest. The appropriate unit is:

> All employees employed by the Respondent in or about its Bartonville, Illinois plants and offices; excluding supervisors, temporary supervisors, permanent foremen, temporary foremen, relief foremen, guards, and firemen, registered nurses, and any other person or persons in the employ of Respondent who are not covered by that collective-bargaining agreement between Respondent and the Union in effect by its terms until May 3, 1990.

KEYSTONE STEEL & WIRE DIVISION OF KEYSTONE CONSOLIDATED INDUSTRIES, INC.

Judith T. Poltz, Esq., for the General Counsel.
Stuart I. Cohen, Esq. of Peoria, Illinois, for the Respondent.
Ronald L. Hamm, Esq. of Peoria, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on May 20 and 21, 1991, in Peoria, Illinois. The charge was filed on November 23, 1988, and amended on July 31, 1989, by Independent Steel Workers' Alliance (the Union). The complaint issued October 5, 1989, and was amended on January 17 and March 20, 1991, to allege that Keystone Steel & Wire, Division of Keystone Consolidated Industries, Inc. (Respondent, Employer, or Company), violated Section 8(a)(1) and (5) of the National Labor Relations Act. More particularly the complaint alleges that Respondent violated the above-cited sections of the Act by unilaterally implementing changes in its management pension plan which adversely affected pension benefits previously earned by unit employees while employed in nonunit capacities covered by the plan. In its answer, duly filed, Respondent denies the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and to present evidence and argument. General Counsel and Respondent filed briefs. Upon the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs. I make the following:

FINDINGS OF FACT[1]

Keystone Steel & Wire, Division of Keystone Consolidated Industries, Inc., operates a facility at Bartonville, Illinois, where it has manufactured steel products and wire since a date prior to 1950. The Independent Steel Workers' Alliance has represented production and maintenance employees at Respondent's Bartonville facility since a date prior to 1950. Since January 1, 1988, and continuing to the present time, there have been approximately 1270 employees employed by Respondent in the unit.

Respondent and the Union have been parties to successive collective-bargaining agreements. The agreement effective from May 3, 1984, until June 20, 1986, is the most recent all-inclusive such document. On or about June 20, 1986, Respondent and the Union entered into an agreement to amend and extend the 1984–1986 agreement effective until May 3, 1990. Subsequently, the agreement was extended to May 3, 1993.

Under the collective-bargaining agreement between Respondent and Union, bargaining unit members who leave the unit for service to Respondent outside the unit do not lose their plant seniority. However, such individuals do not accrue additional seniority for such period outside the unit.

Since before 1958, several of Respondent's employees have worked in the bargaining unit represented by the Union before being transferred or promoted to nonunit positions. While employed in the bargaining unit, these individuals were active participants in the ''Keystone-Bartonville Pension Plan'' sponsored and administered by Respondent (Union Plan). While employed in supervisory, managerial and other non-bargaining unit positions, these individuals were active participants in the ''Keystone Steel & Wire Company Pension Plan'' sponsored and administered by Respondent (Management Plan), and inactive participants in the Union Plan because of the benefits they earned under that plan. Individuals who returned to the bargaining unit from supervisory, managerial, and other nonbargaining unit positions resumed active participation in the Union Plan and participated inactively thereafter in the Management Plan because of the benefits they earned under that plan. An individual who has actively participated in both the Union Plan and the Management Plan and thereby earned retirement benefits under both plans is referred to herein as a dual participant.

The Union Plan and the Management Plan are funded through separate trusts both of which participate in the Keystone Consolidated Industries, Inc. Master Retirement Trust (Master Retirement Trust). As required by the Master Retirement Trust, the assets of each participating trust are accounted for separately.

The Union Plan and the Management Plan each provide for a ''special initial pension payment'' upon retirement in lieu of payments during the first 3 months, and for monthly retirement benefit payments thereafter. The Union Plan and the Management Plan each forbid payment of benefits to a retiree based on a period of employment for which that retiree is entitled to benefits from another plan. The Union Plan and the Management Plan each provide for various retirement benefit options which, on the basis of different qualifying conditions, entitle participants to receive either: (1) a reduced benefit through early retirement; or (2) a full benefit through total and permanent disability or through normal retirement. Although the retirement benefit options in the Union Plan differ from those in the Management Plan, under each plan the qualifying conditions which must be satisfied by a participant to be entitled to elect a particular benefit option under which the participant will receive a full benefit are separate and independent from the factors determining the amount of the participant's benefit from that plan. The Union Plan and the Management Plan each permit participants to combine all periods of service with Respondent, whether in bargaining unit or nonbargaining unit positions, for purposes of vesting and eligibility to elect one or more of the retirement benefit options available.

As used herein, the term ''vesting service'' refers to employment with Respondent when enrolled as a participant in either the Union Plan or the Management Plan; that is, whether employed in unit or nonunit positions. As used herein with respect to the Management Plan, the term ''benefit service'' refers to employment with Respondent in a nonunit position. As used herein with respect to the Union Plan, ''benefit service'' refers to employment with Respondent in a unit position.

The Union Plan and the Management Plan operate on the same plan year. In its administration of the Union Plan and the Management Plan, Respondent is obligated to: (1) contribute to both Plans annually to fund benefits that are earned under the plans; and (2) furnish each participant with an annual statement of the participant's accrued benefits under the plans. For such purposes, at all times material herein, and continuing to date, in cases in which, in the middle of a plan year, an individual was transferred from a unit to a nonunit position or from a nonunit to a unit position, the individual's status at the end of the plan year determines the plan in which he or she will be considered an active participant. Thus, for example, if an individual serves the first 8 months of a plan year in a nonunit position and then serves the final 4 months of the plan year in a unit position, the yearend employee census information furnished to the actuaries for the plans in order to determine Respondent's funding obligations to each of the plans includes the individual with other participants in the Union Plan. Similarly, when it prepares the annual statement of each participant's accrued benefit, Respondent provides the individual who is in the unit at the end of a plan year with an annual statement showing the name of the Union Plan. However, as explained below, the additional benefit earned by the individual for the year is divided between the plans according to the individual's benefit service for the year. Accordingly, the participant is credited with earning an additional benefit under the Management Plan for the 8 months of service in the nonunit position and is credited with earning a benefit under the Union Plan for the 4 months of service in the unit position. Except for the minimum accrual provision of the Union Plan, which has never been applied to an individual for a year in which that individual changed between the Union Plan and the Management Plan, the formula of the Union Plan and the formula of the Management Plan for benefits accrued from 1981 through the plan year ending June 30, 1989, were identical. For this reason, during the period 1981–1989, the total accrued bene-

[1] In its answer, Respondent concedes jurisdiction and the status of the Union as a labor organization. This section of the decision is based almost entirely on the stipulation of the parties received into the record as Jt. Exh. 20.

fit for the year, earned by the individual in part under the Management Plan and in part under the Union Plan, has been exactly the same as if the individual had accrued the benefit entirely under either of the Plans.

Because of economic and business conditions in the early and mid-1980s, Respondent sought and obtained, pursuant to section 412(d) of the Internal Revenue Code (IRC) and section 303 of the Employee Retirement Income Security Act (ERISA) 29 U.S.C. § 1083, ''funding waivers'' for the plan years ending: June 30, 1980; June 30, 1984; and June 30, 1985. These funding waivers permitted Respondent to amortize the required annual contributions to the Union Plan and the Management Plan, for each of the plan years involved, over a period of 15 years, beginning on the date the original required annual contributions were due for each respective plan year involved, so long as the plans continued to satisfy statutory conditions imposed by the IRC and ERISA. The funding waivers are still in effect and the last will expire, if not extended, no earlier than June 30, 2000.

In 1981, the Management Plan was amended to specify a formula for the benefit earned or accrued by ''prior service,'' i.e., for service up to and through 1980. With exceptions that are not relevant herein, this formula generally provided that a participant's monthly normal retirement benefit would be 1.1 percent of the participant's monthly average earnings over the 5 calendar years when the individual received the highest annual compensation in his employment with Respondent (whether in unit or nonunit positions), multiplied by the number of years of benefit service in both unit and nonunit positions before January 1, 1981. Since the factors of this formula had already been determined individually for each participant and would not change, this accrued benefit of each participant is referred to as the 1980 ''frozen'' amount. This amendment was not the subject of any negotiations between Respondent and the Union.

Also in 1981, after negotiations between Respondent and the Union, the Union Plan was amended to establish a formula to determine the 1980 ''frozen'' amount, i.e., the benefit earned or accrued by service through 1980, under that plan. With exceptions that are not relevant herein, the formula provided that a participant's normal retirement benefit would be 1.2 percent of the individual's monthly average earnings over the 5 calendar years when the individual received the highest annual compensation in his employment with Respondent (whether in unit or nonunit positions), multiplied by the participant's number of years of benefit service in both unit and nonunit positions before January 1, 1981.

In 1981, Respondent computed the 1980 ''frozen'' amounts of all its personnel, both in unit and nonunit positions. The benefit formula applied to any individual was the formula contained in that plan in which the individual was an active participant on January 1, 1981. Thus, in the case of a dual participant outside the bargaining unit on January 1, 1981, his or her ''frozen'' amount was determined by application of the formula in the Management Plan. Similarly, the ''frozen'' amount of a dual participant in the bargaining unit on January 1, 1981, was determined by application of the formula in the Union Plan. A document recording the computation of each participant's 1980 ''frozen'' amount was placed in his or her personnel file. Since 1981, the 1980 ''frozen'' amount of each individual has remained unchanged.

Under the Union Plan, the dollar amount of the benefit earned and payable to a participant is the sum of: (1) the 1980 ''frozen'' amount; and (2) the benefit accrued since January 1, 1981.

Annual benefit accruals earned under the Union Plan since January 1, 1981, are determined by a formula, sometimes referred to by the parties as a ''career average'' formula. Specifically, a participant in the Union Plan earns or accrues an additional benefit each year or fraction of a year the participant works in the bargaining unit in an amount equal to 1.2 percent of the participant's ''recognized compensation,'' i.e., monthly average earnings for the calendar year up to the taxable wage base for purposes of Social Security, plus 1.75 percent of the participant's ''recognized compensation,'' i.e., monthly average earnings for the year in excess of the taxable wage base amount.

Since prior to May 3, 1982, the Union Plan has provided various categories of retirement benefit options, each with separate eligibility criteria, generally based on years of service and age upon retirement. Among these is a benefit option, referred to as ''Thirty-and-Out,'' by which participants are permitted to retire and receive immediate full benefit payments after 30 years of employment by Respondent. Effective May 3, 1982, the Union Plan was amended to limit the ''Thirty-and-Out'' retirement option only to participants who had been hired or rehired prior to May 3, 1982, and employed continuously thereafter, without a loss of seniority as defined in the collective-bargaining agreement. Thus, participants hired (or rehired and treated as new hires for seniority purposes under the collective-bargaining agreement) after May 3, 1982, were not eligible for the ''Thirty-and-Out'' option. As noted above, the period of service for purposes of exercising the ''Thirty-and-Out'' option includes both service in the unit and in nonunit positions, if any.

Under the Management Plan, the dollar amount of the benefit earned and payable to a participant is the sum of: (1) the 1980 ''frozen'' amount; and (2) the benefit accrued since January 1, 1981.

Annual benefit accruals earned under the Management Plan since January 1, 1981, are determined by a formula. Under the formula in effect at all times material herein, a participant in the Management Plan earned or accrued an additional benefit each year or fraction of a year the participant performed nonunit service in an amount equal to 1.2 percent of the participant's monthly average earnings for the calendar year up to the taxable wage base for purposes of Social Security, plus 1.75 percent of the participant's monthly average earnings for the year in excess of the taxable wage base amount.

Prior to November 1, 1982, the Management Plan included, among others, three retirement benefit options:

> (a) ''Normal'' retirement at age 65 with ten years of vesting service or at age 62 with fifteen years of vesting service;
>
> (b) ''Early'' retirement at age 60 with fifteen years of vesting service, with an actuarially reduced monthly benefit to reflect the early payments; and
>
> (c) ''Thirty and Out'' retirement benefit under which a participant was eligible for retirement with an immediate full benefit upon completing thirty years of vesting service with Respondent.

Effective November 1, 1982, the Management Plan was amended to eliminate the ''Thirty-and-Out'' retirement benefit except for those participants who had completed 30 years of vesting service prior to November 1, 1982. In addition, the ''90-point'' option, a new retirement benefit, was added for individuals who were participants in the Management Plan on October 31, 1982, and who, as of that date, had completed at least 10 years of vesting service. The ''90-point'' benefit entitles a participant to retire with an immediate full benefit when the sum of the participant's years of age plus the participant's years of vesting service equals or exceeds 90.

The following will illustrate the operation of the ''Thirty-and-Out'' option prior to the 1982 amendments to the Union and Management Plans described above. Participants in either plan were eligible to retire under the ''Thirty-and-Out'' option on completing 30 years of service for Respondent, whether the service had been performed in the unit, in nonunit positions, or in a combination of unit and nonunion service. For example, an individual who served for 10 years in the unit and 20 years in nonunit positions was eligible to retire under the ''Thirty-and-Out'' options in both the Management and Union Plans.

Between September 30 and October 31, 1982, inclusive, three dual participants retired. Between November 1, 1982, and July 31, 1986, another 20 dual participants retired.

At all times material, the amount of the total monthly benefit received by a dual participant under the plans on retirement consists of the sum of: (1) the 1980 ''frozen'' amount, if any; (2) the benefit, if any, accrued after December 31, 1980, under the Management Plan, as computed by application of the benefit formula of the Management Plan; and (3) the benefit, if any, accrued after December 31, 1980, under the Union Plan, as computed by application of the benefit formula of the Union Plan. The individual's total monthly pension benefit is paid in the form of a single monthly check from the trust used to fund the plan under which the individual was an active participant last.

Until 1986, the particular trust which paid the retirement benefits of a dual participant retiree was determined by whether the individual was deemed to have retired from a unit position or nonunit position. For example, if a dual participant retired from a unit position, the trust used to fund the Union Plan absorbed the entire cost of the participant's total monthly retirement benefit and made no charges against the trust used to fund the Management Plan under which the retiree had earned part of that benefit.

In 1985, representatives of the Union became aware Respondent was allocating charges to the Union Plan for dual participant-retirees as described above. Promptly thereafter, the Union presented its position to the Respondent that: (1) assets from the trust used to fund the Union Plan should not be used to pay the entire retirement benefit of a dual participant who returned to the unit immediately prior to retirement and proceeded to retire under the Union Plan, but such retirement benefit should be allocated between the trusts used to fund the Management and Union Plans according to relative service under the Plans; and (2) the Union Plan should be made whole for Respondent's past incorrect allocation of payments between the trusts used to fund the Union Plan and Management Plan.

As a result of their discussions, Respondent and the Union agreed in 1986 that Respondent would: (1) identify the dual participants who had retired since September 30, 1982; (2) determine the correct allocation of benefits attributable to each plan; (3) determine whether and to what extent the assets of the Union Plan had been overcharged; (4) restore the Union Plan with assets equal to the amount of the overcharge, plus interest thereon; and (5) thereafter charge the assets of the Union Plan in proportion to benefits earned under that plan. Respondent and the Union further agreed upon a formula (the 1986 allocation formula) to be used to determine the amount of benefits attributable to each plan. In addition, Respondent and the Union agreed that no adjustment would be made to the allocation of payments of benefits to dual participants who retired prior to September 30, 1982.

The 1986 allocation formula referred to above, provided that: (1) each dual participant retiree's 1980 frozen amount was to be allocated between the assets of the Management and Union Plans in proportion to the numbers of months of service under the respective plans prior to January 1, 1981; (2) benefits earned after January 1, 1981, would be computed in accordance with the formulas of the respective plans and charged to the assets of each plan in proportion to the total amounts accrued under the respective plans; and (3) the special initial pension payment to each retiree, described above, was to be allocated against the assets of each plan in proportion to the total months of service of the individual under each plan.

In accordance with the agreement, described above, in 1886 Respondent analyzed the benefit accruals and payments from the Union Plan and the Management Plan for all 23 dual participants who had retired since September 30, 1982. Based on these calculations, Respondent found that the assets of the Union Plan had been overcharged for retirement benefit payments from 1981 until 1986 and that the assets of the Management Plan had been undercharged for such payments. Accordingly, Respondent caused the trustee of the Management Plan to transfer from that plan to the Union Plan the amount of the overcharge together with earnings on that amount, thereby making the Union Plan whole.

Since the 1986 correction, payments of benefits earned under the Union Plan have been charged to the assets of the Union Plan, and payments of benefits earned under the Management Plan have been charged to the assets of the Management Plan, in accordance with the agreement and 1986 allocation formula.

After the 1986 correction, between August 1, 1986, and November 1, 1988, 15 dual participants retired.

The three dual participants who retired between September 30, 1982, and October 31, 1982, qualified for retirement under the ''Thirty-and-Out'' options of both the Management Plan and the Union Plan. Of the 35 dual participants who retired between November 1, 1982, and November 1, 1988, 16 qualified for various retirement options under both the Management Plan and the Union Plan. The remaining nineteen dual participants who retired during this period qualified for the ''Thirty-and-Out'' option of the Union Plan, but did not immediately qualify for a full benefit at retirement under any option of the Management Plan. Nevertheless, Respondent permitted payment to each of these 19 retirees, immediately upon retirement, of a full monthly accrued benefit under the Union Plan and a full monthly accrued benefit under the

Management Plan, with payments allocated as provided in the 1986 agreement and formula described above. Respondent asserts that such payment of benefits from the Management Plan to these nineteen individuals was inconsistent with the terms of the Management Plan and should not have been made.

In early November 1988, on advice of its attorneys, Respondent concluded that its administration of the Management Plan, with regard to its payment of benefits under the ''Thirty-and-Out'' option, as described above, was not in accord with the provisions of that plan.

During November 1988, Respondent decided to take the following actions with respect to its administration of the Management Plan's ''Thirty-and-Out'' option: (1) repay to the trust used to fund the Management Plan a sum equal to the payments made from the assets of the plan to the nineteen dual participants who elected to retire under the ''Thirty-and-out'' option between November 1, 1982, and November 1, 1988, at times when they were ineligible to receive pension benefits under any option of the Management Plan (affected retirees), plus earnings that would have accrued on those payments; (2) discontinue the practice of making benefit payments from assets of the Management Plan to the affected retirees, all of whom were still ineligible to receive those payments under any option of the Management Plan, as well as to any and all dual participants in nonunit positions and in unit positions not yet retired who thereafter elected to retire under the ''Thirty-and-Out'' option for which they qualified under the Union Plan when they did not satisfy the criteria for eligibility under any retirement option of the Management Plan; (3) make regular payments from the general assets of Respondent to the affected retirees in amounts equal to those payments which they had previously received from the Management Plan until each becomes eligible under any retirement option of the Management Plan; and (4) notify any and all dual participants in nonunit positions and in unit positions, whether retired or still working, about these measures.

The measures of the Respondent summarized above concerned three groups of participants of the Management Plan. These groups, and the numbers of individuals in each group in November 1988, were: (1) the 19 affected retirees; (2) 147 dual participants currently employed in management or other nonbargaining unit positions (group 2); and (3) dual participants currently employed in bargaining unit positions (group 3). Respondent has identified 36 individuals in group 3, and it is not disputed that there may be additional individuals in group 3.

Of the 36 identified individuals in group 3, all had left the bargaining unit once and returned once. These individuals returned to the unit on various dates between May 12, 1962, and August 17, 1987, and remained in the unit thereafter. Thirty-three had worked for Respondent outside the unit as foremen in positions supervising bargaining unit employees for periods of time varying from 5-1/2 months to 26 years and 9 months. Three had worked for Respondent outside the unit in nonsupervisory positions for periods of time ranging from 5 months to 6 years. Two had been employed outside the unit and returned because Respondent, in exercising its discretion, reclassified their jobs as payroll clerks from unit positions to nonunit positions and then, about 2 years later, reclassified their jobs back to unit positions.

Before Respondent notified Management Plan participants of the measures it was taking, three members of group 2 who were not entitled to receive a full benefit under the ''Thirty-and-Out'' option of the Management Plan had already formally applied for retirement under the Management Plan as well as the Union Plan in the belief that they were entitled to return to the unit and retire with a full benefit from each plan. Respondent decided to treat these three individuals as though they were affected retirees.

At the direction of Respondent's vice president of administrative services, Lyle Pfeffinger, letters were drafted to each of the individuals in the three groups of participants identified above, advising them of the measures described above. These letters were mailed to individuals in groups 1 and 2 on November 10 and to group 3 on November 21.

On November 23, 1988, the Union sent a letter to Respondent protesting its unilateral changes in the management pension plan as it pertains to retirement and taking the position that changes could not be made during the life of the current labor agreement without the express agreement of the Union.

Respondent replied by letter dated December 15, 1988, in which it states that it has no obligation to bargain with the Union concerning the terms of the management pension plan or how it is administered. It also denies that there had been any changes in the language of the plan.

Analysis and Conclusion

The above facts clearly indicate that historically the union pension plan and the management pension plan have been regarded, in all respects, as separate and distinct documents. The union pension plan is a document drafted as a result of the collective-bargaining process. Its benefits were meant to be enjoyed by employees in the unit covered by the collective-bargaining agreement and represented by the Union. The benefits to be derived under this plan are, like wages, and other benefits and emoluments, remuneration for unit work performed and any unilateral change in its provisions made by the Respondent might well be considered violative of Section 8(a)(5) of the Act.

On the other hand, the management pension plan is a document which is not the result of the collective-bargaining process. The Union had no input, whatsoever, into its initial drafting nor into any subsequent changes in its provisions. Its benefits were meant to be enjoyed by employees, mostly managerial and supervisory employees, who were not unit employees, not covered by the collective-bargaining agreement and not represented by the Union. The benefits to be derived under this plan are, like wages, salaries and other benefits and emoluments, remuneration for work performed outside the unit by nonunit employees and any unilateral change made by the Respondent is at its own discretion.

The Respondent has no obligation to bargain with the Union concerning wages, hours or other conditions of employment of employees who are neither covered by the collective-bargaining agreement nor represented by the Union at the time these employees are earning such benefits.[2] This is so, regardless of whether the benefits being earned by these

[2] *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971); *United Technologies Corp.*, 274 NLRB 1069 (1985), enfd. 789 F.2d 121 (2d Cir. 1986).

nonunit employees are being enjoyed as immediate remuneration in the form of wages, insurance or similar benefits, or in the form of benefits to be enjoyed in the future, such as pension payments after retirement.

The fact that certain nonunit employees might choose to transfer back into a unit job and thereby begin to earn credits under the Union Plan rather than under the Management Plan is irrelevant to the issues here under consideration. Such a transfer does not endow the Union with bargaining rights over the Management Plan where none existed before, nor, ab initio, over the pension credits previously earned by employees they did not represent.

I find that Respondent was not obliged to bargain with the Union before making unilateral changes in the management pension plan and did not thereby violate Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not committed any of the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]